**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| KENNETH C. HELLINGS and JOYCE M. HELLINGS, and TATTERSALL PROPERTIES, L.P., by and through its general partner, TATTERSALL HOMES, INC., and TATTERSALL DEVELOPMENT CO. | : | CIVIL ACTION |
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| | : | NO. 06-CV-3089 |
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| vs. | : | |
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| NVR, INC. and NVR, INC., d/b/a and t/a NV HOMES and NVR, INC., d/b/a and t/a RYAN HOMES | : | |
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**MEMORANDUM AND ORDER**

**JOYNER, J.** **December 6 , 2006**

This case is now before the Court for resolution of Defendants' Motion to Dismiss Plaintiffs' Complaint. For the reasons which follow, the motion is granted in part and denied in part.

**Factual Background**

This case arises out of two Lot Purchase Agreements ("LPA's") entered into between Kenneth C. Hellings, Joyce Hellings and Tattersall Properties, L.P., as sellers and NVR, Inc., ("NVR") as buyer, in October and December, 2000 pursuant to which NVR would purchase some 62 lots from Plaintiffs in the

Tattersall Golf Community in Chester County, Pennsylvania.[1] The purpose of these agreements was to make lots in the Tattersall Golf Community available for sale to NVR with the understanding that it would eventually develop those sites through the construction of homes. In September and October, 2003, however, NVR failed to purchase lots as required under the agreements with the result that Plaintiffs declared it to be in default and retained NVR's deposit monies as liquidated damages as they were allegedly permitted to do under the contracts.

Concomitant to the development of the Golf Community, Tattersall Development Company owned and operated a temporary pump and haul facility which handled the pumping and removal of waste and sewage and serviced the homes located in the Tattersall Golf Community, including those homes built and sold by Defendants. The Township of West Bradford (in which the golf community is located) required Tattersall Development to maintain an escrow account to ensure the availability of adequate funds for pump and haul sewage services. Consequently, Tattersall Development met with NVR representatives to advise NVR of the need to maintain an escrow account and that the cost per day for each lot would be $11.75. As a result of that meeting, NVR agreed to pay pump and sewage hauling charges into the escrow

[1] Jurisdiction in this matter is predicated on complete diversity of citizenship pursuant to 28 U.S.C. §1332, as all of the plaintiffs are citizens of the Commonwealth of Pennsylvania and Defendant is a Virginia corporation with its principal place of business in McLean, Virginia.

account in the amount of $9.00 per day per lot from the date of closing to the date that the permanent sewage treatment facility became operational, thereby limiting the home purchasers' financial responsibility to $2.75 per lot per day or $250.00 per quarter. Although West Bradford Township was to have collected the accrued charges from NVR at the time it issued a certificate of occupancy, it apparently did not do so until January 1, 2004. NVR did pay the supplemental pump and haul charges into escrow when the Township began collecting payments after January 1, 2004 but prior to that date, it had failed to pay the required $9.00 per lot per day into the Township's account (despite the fact that its customers had been paying $2.75 per lot per day directly to Tattersall Development when they had been billed for the services). In an attempt to collect these pre-January 1, 2004 supplemental charges, Tattersall Properties sent two invoices dated September 13 and October 4, 2004 to NVR requesting payment in the amounts of $134,937 and $93,447, respectively. NVR, however, has never tendered payment as requested on the invoices.

In Counts I and II of their complaint in this case, Plaintiffs seek to recover the unpaid supplemental pump and haul sewage charges under the state common law theories of breach of contract and unjust enrichment. In addition, Plaintiffs allege that NVR caused damage to the roadways, curbs, sewer grates and storm sewers ("development damages") during the course of its

development of the lots which it did purchase through 2004 and 2005. Although NVR purportedly acknowledged its responsibility to pay for repairs to the storm sewer inlets and curbs, it has denied responsibility to pay for the roadway repairs. As of June 13, 2006, however, Defendant has wholly failed to pay for any of the development damages at the Tattersall Golf Community. In Counts III and IV of the complaint, Plaintiffs seek to recover these damages under the common law theories of negligence and breach of contract.

By way of its motion to dismiss the plaintiffs' complaint, NVR first argues that the plaintiffs' claims for breach of contract and unjust enrichment in Counts I, II and IV must be dismissed because the liquidated damages provisions in the LPAs bar the plaintiffs' claim for actual damages. In the alternative, Defendant asserts that Count I should be dismissed because the plaintiffs'--not NVR, are responsible under the LPAs for the pump and haul sewage charges at issue in Count I. Defendant further contends that the plaintiffs' claim for negligence in Count III should be dismissed because the "gist of the action" doctrine precludes a party from raising tort claims where the essence of the claim actually lies in a contract that governs the parties' relationship.

**Standards Governing Rule 12(b)(6) Motions to Dismiss**

It has long been the rule that in considering motions to

dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Krantz v. Prudential Inv. Fund Mgmt., LLC, 305 F.3d 140, 142 (3d Cir. 2002); Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000)(internal quotations omitted). See Also: Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may only be granted where the allegations fail to state any claim upon which relief may be granted. See, Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004); Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Center Properties, Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Gen. Refractories v. Fireman's Fund Ins., 337 F.3d 297, 303, n.1 (3d Cir. 2003); Klein v. General Nutrition Companies, Inc., 186 F.3d 338, 342 (3d Cir. 1999)(internal quotations omitted). It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re

Rockefeller, 311 F.3d at 216. A court may, however, look beyond the complaint to extrinsic documents when the plaintiff's claims are based on those documents. GSC Partners, CDO Fund v. Washington, 368 F.3d 228, 236 (3d Cir. 2004); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426. See Also, Angstadt v. Midd-West School District, 377 F.3d 338, 342 (3d Cir. 2004).

**Discussion**

A. Motion to Dismiss Counts I, II and IV

As noted, Defendant first asserts that Plaintiffs have failed to plead viable claims upon which relief may be granted in Counts I, II and IV because the Lot Purchase Agreements contain liquidated damages clauses thereby limiting the damages to which Plaintiffs are entitled to the deposit monies already retained as liquidated damages. Plaintiffs respond that, because only Tattersall Development Co. is the plaintiff in Counts I and II and it did not execute the lot purchase agreements, its claims for breach of contract and unjust enrichment are not barred.

In Pennsylvania, liquidated damages clauses are enforceable if at the time the parties formed the contract, the amount of the liquidated damages constituted a reasonable approximation of the expected loss. Zemenco, Inc. v. Developers Diversified Realty Corp., No. 05-4896, 2006 U.S. App. LEXIS 27747 at *10 (3d Cir. Nov. 9, 2006), citing Carlos R. Leffler, Inc. v. Hutter, 696 A.2d

157, 162 (Pa. Super. 1997). Parties who agree to a proper liquidated damages clause cannot later claim entitlement to actual damages. Zemenco, at *11. A liquidated damages clause that limits a seller's recovery to funds paid as a deposit is enforceable provided that the resulting amount of damages is not so large as to amount to a penalty. Id., citing Palmieri v. Partridge, 853 A.2d 1076, 1080-81 (Pa. Super. 2004).

It is "hornbook law that the test for enforceability of an agreement is whether both parties have manifested an intention to be bound by its terms and whether the terms are sufficiently definite to be specifically enforced." Atacs Corp. v. Trans World Communications, Inc., 155 F.3d 659, 665 (3d Cir. 1998), citing, *inter alia*, Lombardo v. Gasparini Excavating Co., 385 Pa. 388, 123 A.2d 663, 666 (1956) and Linnet v. Hitchcock, 324 Pa. Super. 209, 471 A.2d 537, 540 (1984). To state a claim for breach of contract, a plaintiff must thus only plead "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003); Harold ex rel. Harold v. McGann, 405 F.Supp.2d 562, 572 (E.D. Pa. 2005); CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999).

A cause of action for unjust enrichment may arise only when a transaction of the parties not otherwise governed by an express

contract confers a benefit on the defendant to the plaintiff's detriment without any corresponding exchange of value. Villoresi v. Femminella, 856 A.2d 78, 84 (Pa. Super. 2004), citing Temple University Hospital v. Healthcare Management, 832 A.2d 501, 507 (Pa. Super. 2003) and Mitchell v. Moore, 729 A.2d 1200, 1203-04 (Pa. Super. 1999). In that event, the law may imply a contract, requiring the defendant to pay to the plaintiff the value of the benefit conferred. Id., citing Mitchell, 729 A.2d at 1203. Such a "quasi-contract" imposes a duty "not as the result of any agreement, whether express or implied, but in spite of the absence of an agreement" where the circumstances demonstrate that it would be inequitable for the defendant to retain the benefit conferred without payment. Id., citing Temple, 832 A.2d at 507. Where an express contract already exists to define the parameters of the parties' respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist. Id., citing Mitchell, supra. Thus, dismissal of an unjust enrichment claim is appropriate when the relationship between the parties is founded on a written instrument. Harold ex rel. Harold, 405 F.Supp.2d at 579.

In reviewing the Lot Purchase Agreements attached as Exhibits A and B to the Complaint, we find that those agreements were "between Kenneth C. and Joyce M. Hellings, husband and wife

and Tattersall Properties, L.P., a Pennsylvania limited partnership, tenants by the entirety, jointly and severally (collectively, the "Seller") and NVR, Inc., a Virginia corporation d/b/a Ryan Homes (the "Purchaser")." Although the complaint here is far from a model pleading and is conspicuously silent as to what the relationship is between the Hellings, Tattersall Properties, L.P. and Tattersall Development Co., it appears at this juncture that Tattersall Development Co. was not a party to the Lot Purchase Agreements and thus is presumably not bound by the Default provisions contained therein which limit the seller's remedies to receiving the deposit monies from the escrow agent. We thus find that for Rule 12(b)(6) purposes, the plaintiffs' complaint adequately pleads claims for breach of contract and unjust enrichment stemming from the alleged failure of the defendant to pay pump and haul sewage charges.

In Count IV, however, the plaintiffs are "Tattersall Properties, L.P. by and through its General Partner, Tattersall Homes, Inc., Kenneth C. Hellings and Joyce M. Hellings," and the defendants are "NVR, Inc., NVR, Inc., d/b/a NV Homes and NVR, Inc., t/a Ryan Homes." Thus, the parties to this Count are identical to the parties to the Lot Purchase Agreements. Paragraph 7 of the LPAs provides as follows in relevant part:

> After issuance of the Completion Notice and prior to settlement on any of the Lots pursuant to this Agreement, representatives of Seller and Purchaser shall inspect the improvements relating to this Agreement and establish a list

> of reasonable deficiencies hereinafter referred to as the "Lot Inspection Report" (Exhibit "F-1"). Seller shall repair all deficiencies (except final paving) within thirty (30) days of said Lot Inspection Report or complete said deficiencies upon conclusion of Purchaser's house construction in a timely manner to insure issuance of occupancy permits as agreed by and between Purchaser and Seller. Subsequent to settlement, Purchaser shall be responsible for damages to the improvements serving the Lot or Lots not detailed on the Lot Inspection Report. Upon completion of home construction activity in a given phase or section, Purchaser and Seller, upon notification of the other, shall meet to complete the Lot Completion Report (Exhibit "F-2") to list all reasonable deficiencies not listed on the Lot Inspection Report (Exhibit "F-1") for which Purchaser is responsible to repair. Upon request, Purchaser shall repair all deficiencies listed on the Lot Completion Report within thirty (30) days of notification, weather permitting, at its expense, or at such other time as shall be agreed upon between Purchaser and Seller. In the event Purchaser shall fail to make repairs so as to satisfy Township requirements, then Seller shall make such repairs and charge Purchaser and Purchaser shall pay Seller's costs for such repairs....
>
> Purchaser's obligation to make repairs to Seller's improvements shall cease upon completion of the repairs listed on the Lot Completion Report.

Under paragraph 11(a),

> In the event of any breach, failure or default by Purchaser under the terms of this Agreement (which breach, failure or default is not timely remedied or cured by Purchaser pursuant to any other provisions hereof), Seller's sole and exclusive right and remedy shall be to receive the Deposit from the Escrow Agent, or so much thereof as shall then be remaining in the Escrow Agent's hands, as full, fixed and liquidated damages, not as a penalty, whereupon this Agreement shall terminate and thereafter the Purchaser and Seller shall be relieved of further liability hereunder, at law or in equity; it being the agreement of the parties that Purchaser shall have no liability or obligation for default hereunder except to the extent of the Deposit made herein, and in no event shall Purchaser's liability or responsibility for any failure, breach or default hereunder exceed the total amount of the Deposit as constituted after application of the Deposit Credit applicable to any Lot

> closed by Purchaser hereunder, and in no event shall Seller be entitled to specific performance of this Agreement.

It thus appears from reading these two clauses *in pari materia* that the some $52,000 in development damages claimed by the plaintiffs were contemplated in the LPAs and that by keeping the deposit monies as liquidated damages, plaintiffs' claims in Count IV are barred. Accordingly, Count IV shall be dismissed.

In addition, the Defendant alternatively argues that the alleged pump and haul sewage charges are the responsibility of *the plaintiffs* --not the defendant, under the LPAs and therefore Count I of the complaint is properly dismissed.

Specifically, Section 6(d) of the Agreements reads as follows:

> The Seller shall install water and sewer mains in the street with laterals installed according to industry standards. The Seller shall be obligated to pay any allocation and/or tap fees and off-site charges. Seller shall furnish written evidence of the paid fees and show that such are transferable from the Seller to Purchaser. Seller shall clearly mark and locate the sewer and water service for each Lot at the location mentioned above.

While we would agree with Defendant that this provision dictates that the plaintiffs were responsible for installing water and sewer mains in the streets with appropriate laterals, it is silent as to the sellers' obligation to construct, maintain and operate a temporary sewage pump and haul facility. Accordingly, we decline to dismiss Count I on the basis of this language.

B. Motion to Dismiss Count III

Defendant next contends that Count III, which sounds in negligence, should be dismissed as that claim is barred by the "gist of the action" doctrine. We agree.

Under the "gist of the action" test, Pennsylvania intermediate courts have held[2] that plaintiffs may not recast ordinary breach of contract claims into tort claims. Harold ex rel. Harold, 405 F.Supp.2d at 576-577. Thus, "when a plaintiff alleges that the defendant has committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is 'collateral' to conduct that is primarily tortious." Caudill Seed and Warehouse Company, Inc. v. Prophet 21, Inc., 123 F.Supp.2d 826, 833 (E.D.Pa. 2000), citing Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc., 40 F.Supp.2d 644, 651 (W.D. Pa. 1999); Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825 (1992). Courts differentiate tort from contract claims, in part, by the source of the duty imposed on the defendant: tort actions lie for breaches of duties

[2] Although the Pennsylvania Supreme Court has neither accepted nor rejected the doctrine, the Pennsylvania Superior Court and several U.S. District Courts have predicted that it would. Harold ex rel. Harold, 405 F.Supp.2d at 577, n.11, citing *inter alia*, Air Products and Chemicals, Inc. v. Eaton Metal, 256 F.Supp.2d 329, 340 (E.D.Pa. 2003); eToll, Inc, v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14 (Pa. Super. 2002); Bash v. Bell Telephone Co. Of Pennsylvania, 411 Pa. Super. 347, 601 A.2d 825 (1992).

imposed by law as a matter of social policy, while contract actions lie only for breaches of duty imposed by mutual consensus agreements between particular individuals. Chemtech International, Inc. v. Chemical Injection Technologies, Inc., 170 Fed. Appx. 805, 809 (3d Cir. March 20, 2006), citing Sullivan v. Chartwell Investment Partners, L.P., 873 A.2d 710, 719 (Pa. Super. 2005). See Also, Redevelopment Authority of Cambria County v. International Insurance Company, 454 Pa. Super. 374, 392, 685 A.2d 581, 590 (1996). Under the gist of the action test, a contract action may not be converted into a tort action simply by alleging that the conduct was done wantonly. Northeastern Power Company v. Balcke-Durr, Inc., Civ. A. No. 97-CV-4836, 1999 WL 674332 at *9, *12 (E.D. Pa. Aug. 23, 1999); Phico Insurance Company v. Presbyterian Medical Services Corporation, 444 Pa. Super. 221, 229, 663 A.2d 753, 757 (1995).

In Count III, Plaintiffs Tattersall Properties, L.P., by and through its General Partner, Tattersall Homes, Inc., Kenneth Hellings and Joyce Hellings seek to hold NVR, Inc., d/b/a NV Homes and Ryan Homes, liable for the development damages to storm sewers, roadways and curbs at the Tattersall Development which were purportedly "caused by the negligent, careless, and reckless conduct of" [their] "agents, servants, workmen and/or employees...who were responsible for developing the properties on behalf of Ryan Homes and NV Homes." (Complaint, ¶s 77, 79).

As paragraph 7 and Exhibits “F-1,” “F-2" and “E” of the LPAs indicate, the installed improvements contemplated thereunder include curbs, gutters, rough grading, storm sewers, sanitary sewers and laterals, water mains and laterals and paved streets and subsequent to settlement on the lots, the Purchaser (NVR) is responsible for the damages to the improvements serving the lot or lots not detailed on the Lot Inspection Reports. We therefore find that the “gist” of the plaintiffs’ negligence claim in Count III clearly sounds in contract rather than in tort and that it is properly stricken on the basis of the gist of the action doctrine.

For all of the reasons set forth above, the defendants’ motion to dismiss shall be granted in part and denied in part and Counts III and IV of the plaintiffs’ complaint shall be dismissed in accordance with the attached order.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| KENNETH C. HELLINGS and JOYCE M. HELLINGS, and TATTERSALL PROPERTIES, L.P., by and through its general partner, TATTERSALL HOMES, INC., and TATTERSALL DEVELOPMENT CO. | : | CIVIL ACTION |
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**ORDER**

AND NOW, this 6th day of December, 2006, upon consideration of the Defendants' Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) (Document No. 3) and Plaintiffs' Response thereto, it is hereby ORDERED that the Motion is GRANTED IN PART and DENIED IN PART and Counts III and IV of Plaintiffs' Complaint are DISMISSED with prejudice.

IT IS FURTHER ORDERED that Defendants are DIRECTED to file their Answer to Counts I and II of the Complaint within twenty (20) days of the date of this Order.

BY THE COURT:

/s/ J. Curtis Joyner
J. CURTIS JOYNER, J.